89-1517

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1989

KENNETH LINN,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. When a trial court in a continuing criminal enterprise prosecution limits the government to arguing that only those in a subclass of co-conspirators potentially qualify for treatment as supervisees under 21 U.S.C. §848(c)(2)(A), on the basis that only as to individuals in that subclass may a rational juror find qualifying status beyond a reasonable doubt, must the court thereafter, on request, and consistent with In re Winship, 397 U.S. 358 (1970), Jackson v. Virginia, 443 U.S. 307 (1979), and Evidence Rule 105, also instruct the jury that it is limited to finding qualified supervisees from individuals within that subclass?

II. When a trial court in a continuing criminal enterprise prosecution prohibits the government from arguing to the jury that two

individuals are potentially qualifying supervisees under 21 U.S.C. §848(c)(2)(A), because the government failed in its original and amended bills of particulars to give notice that these individuals were persons it would allege were supervisees, must the trial court on request, pursuant to Evidence Rule 105, also instruct the jury that these two individuals cannot be considered as potentially qualifying supervisees?

III. Where the evidence in a continuing criminal enterprise prosecution is close as to whether or not the government has proven the full complement of five supervisees required by 21 U.S.C. §848(c)(2)(A), are the identities of the minimum five supervisees essential to proof of this element of the offense such that the defendant is entitled, under In re Winship, 397 U.S. 358 (1970) and the Sixth Amendment, to an instruction requiring that the jury be unanimous as to

the identities of at least five individuals it deems to be supervisees?

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Kenneth Linn petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming his judgment of conviction.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-19a) is reported at 889 F.2d 1369 (5th Cir. 1989). The opinion of the district court denying petitioner's

post-verdict motion for judgment of acquittal (App. B, infra, 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1989. Petitioner's applications for rehearing and for rehearing en banc were denied on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

21 U.S.C. §848 provides in relevant part:

* * *

> (c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of

> violations of this subchapter or subchapter II of this chapter --
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 7(f) of the Federal Rules of Criminal Procedure provides:

> (f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any

> time subject to such conditions as justice requires.

Rule 105 of the Federal Rules of Evidence provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

STATEMENT OF THE CASE

The government charged petitioner in an 18 count indictment with various drug violations. Count 1 charged that petitioner, between January 1, 1979 and July 1, 1981, conducted a continuing criminal enterprise (CCE), in violation of 21 U.S.C. §848. Count 2 charged that petitioner, during the same period, conspired to possess with intent to distribute and to distribute kilogram quantities of cocaine, in violation of 21 U.S.C. §846. The general drug conspiracy

charge of Count 2 was considered by all parties and by the trial court to be a lesser included offense of the Count 1 CCE charge. See, Jeffers v. United States, 432 U.S. 137 (1977).

The remaining counts alleged various substantive cocaine distribution offenses (21 U.S.C. §841(a)(1)), aiding and abetting offenses (21 U.S.C. §2), and telephone facilitation offenses (21 U.S.C. §843(b)). In opening statement petitioner admitted to the jury that, for all intents and purposes, he was guilty of these offenses. He also admitted that he was guilty of the general drug conspiracy alleged in Count 2. The issue before the jury was to be petitioner's guilt of conducting a continuing criminal enterprise, and more particularly, whether the government would prove that element of the CCE offense requiring that a defendant's actions constitute "a continuing series of

violations... (A) which are undertaken by such a person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. §848(c)(2).

1. Count 1 charged the CCE offense by tracking the language of §848. The charging language gave no information about, and imposed no limits upon, the identities of those persons as to whom petitioner might have occupied "a position of organizer, a supervisory position, or any other position of management" (hereinafter, sometimes "supervisees").[1]

2. Because the supervisee question was to be the crux of the defense, petitioner sought from the outset to gain information about and impose reasonable limits upon the

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[1]The charging language of Count 1 is reproduced in the opinion of the court of appeals at App. 3a-4a.

identities of those whom the government would contend occupied the role of supervisee vis-a-vis petitioner. Among his many requests for discovery, petitioner asked that the magistrate direct the government to file a bill of particulars, Criminal Procedure Rule 7(f), identifying the five or more individuals petitioner was alleged to have organized, supervised or managed. On November 4, 1987, the magistrate denied all opposed discovery requests except the bill of particulars, which he decided was a minimum of notice demanded by fundamental fairness.

The government bridled and raised the spectre of danger to its witnesses if their identities were disclosed. Its in camera affidavits were rejected as insufficient,[2]

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[2]The magistrate, based on the government's showing, did order the sealing of one name. That decision became irrelevant to the subsequent proceedings when the government did not rely before the jury upon this unidentified party as one of the supervisees.

and reconsideration was denied. The government then appealed the magistrate's order to the district court, which on December 30, 1987, affirmed the magistrate. Trial was then set for January 11, 1988.[3]

3. Compelled now to file a bill of particulars listing those it would contend were supervisees, the government made a kitchen sink response: it named 23 persons or categories of persons, many of whom the evidence would later show could not possibly have been candidates nor reasonably have been thought to be candidates for supervisee status. The 23 were:

Joan Andre
Charles Brazel
Flo Burke
William Burns
Robert Lee Collins
Justin Derbin (sic)
Ann Desbon

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[3]It should be noted that the trial did not start as scheduled on January 11, 1988 only because of a death during the preceding weekend in defense counsel's family. Trial did begin one week later, on January 18, 1988.

Gail Lawing
Rudy Keys
Vincent Marcello
Ronnie Martin
Averil Missich
Nick Popich
Mike Ruperich (sic)
Marsha Smith
Gary Young
Several unidentified persons of Latin persuasion
Hawaiian Michael
Tomato
Cuban Joey
Chico
Unidentified persons recieving shipments of narcotics from Linn through airport to airport mail service.

Criminal Procedure Rule 7(f) permitted the government to amend this bill of particulars, and on the Friday before the Monday, January 11, 1988 trial setting, when its trial preparations were most certainly close to completion if not complete, the government did file an amended bill of particulars. It added two names to its list, Lynn Gelles and Leo Radosta. This final list of 25 persons or categories of person was the bill of particulars when trial commenced, and

it remained the bill of particulars through trial to verdict.

4. Besides those named in the final bill of particulars, the government knew about other persons whose paths had crossed petitioner's while petitioner was selling drugs. Among these individuals were two Miami attorneys, Frank Diaz and Robert Dane Smith. The government in pre-trial discovery provided to the defense numerous documents, including several with these attorneys' names on them.[4] Yet, neither at the time it provided petitioner with the documents nor at

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[4]At trial the government's evidence would show (in the light most favorable to the government) that Attorney Diaz enabled petitioner to avoid cash reporting requirements at a bank which the attorney ran, and held a power of attorney that allowed petitioner to set up and gain access to a post office box where petitioner received cocaine payments. At trial, the government's evidence would show that Attorney Smith helped petitioner transport $320,000 in cash out of the United States, and provided written instructions to a Bahamian money launderer who transported the cash to the Turks & Caicos Islands.

any time thereafter did the government amend or seek to amend its bill of particulars to assert that these attorneys were among those whom it would contend to the jury qualified as supervisees.

5. Although petitioner had conceded guilt of the Count 2 general drug conspiracy, the government was both required and entitled to prove that charge. Petitioner's motion that the court compel an election between Counts 1 and 2, on the contention that they were greater and lesser offenses, had been denied before trial.[5] Thus, the

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[5]Petitioner's motion requested first a particularization of facts by the government to determine if the conspiracy charged in Count 2 was subsumed by the "in concert" allegations of Count 1, in conformity with this Court's analysis in United States v. Jeffers, 432 U.S. 137 (1977); and second, believing that it was subsumed in the Count 1 charge, moved for election. Insisting that it wanted the general conspiracy charge tried along with the CCE charge, the government responded that circuit court jurisprudence appeared to permit the trial of both charges and, in the event of a conviction on both, the vacation of the conviction and sentence on the lesser

government properly offered evidence about persons with whom petitioner was alleged to have conspired in violation of Count 2. It was irrelevant to the permissible proof on Count 2 that some would also clearly qualify, and some as clearly would not qualify, as supervisees under the Count 1 CCE charge. All that was required was that evidence about them advance the government's proof of the general conspiracy. The evidence concerning Attorneys Diaz and Smith therefore was unquestionably admissible in the government's effort to prove the Count 2 general conspiracy.

6. When the government rested, petitioner moved pursuant to Criminal

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charge. That was the course adopted by the court in response to petitioner's motion, a course it implemented when the jury convicted petitioner on both counts. Thus, although petitioner was tried and convicted on Counts 1 and 2, the sentence on Count 2 was imposed and then vacated, so that petitioner stands sentenced at this time only on Count 1.

Procedure Rule 29 for a judgment of acquittal on Count 1. He argued in writing that the government had failed to prove from the persons listed in its bill of particulars the full complement of five supervisees required by §848(c)(2)(A). The government countered orally that it had produced sufficient evidence to qualify more than five persons as supervisees. It named 10 persons from among those it had listed in its bill of particulars.[6] In addition, it named two persons not included in the bill of particulars, the attorneys Frank Diaz and Robert Dane Smith. This was the very first time in the case that the government had raised the names of Diaz and Smith as possibly qualifying supervisees. The trial

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[6]Flo Burke
Charles Brazel
William Burns
Robert Lee Collins
Michael Rouperich
Michael Colvin
Leo Radosta
Judson Durbin
Chico
Rudy Keys

court without stating its reasons denied the motion for judgment of acquittal.

7. Petitioner rested without adducing evidence. Before closing argument, he submitted in writing several motions in limine. The first motion requested that the court limit the government's jury argument on potentially qualifying supervisees: the government should be permitted to argue only those individuals who were both listed in the bill of particulars and as to whom the court, in denying petitioner's Criminal Rule 29 motion, had found sufficient evidence to take to the jury.[7] Before ruling, the trial

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[7]Counsel argued:

> [T]here are numerous individuals about whom we've heard testimony, some of whom clearly qualify, some of whom, I guess, the Court has decided the Jury should determine whether or not they qualify, and some whom clearly do not qualify. It would give the Jury an unwarranted license to find that one of the individuals whom the Court believed did not qualify under the law, to consider that person as

court asked government counsel to name those persons it contended could qualify as supervisees. Counsel enumerated as adequately supported by the evidence the identical 10 persons he had named in resisting the Rule 29 motion. He also named attorneys Diaz and Smith. The court granted this first motion in limine by limiting the government's argument to the 12 individuals the government had just named.

Petitioner then presented his second motion in limine. He demanded that anyone not named in the government's final bill of particulars, i.e., the attorneys Diaz and Smith, be eliminated from juror consideration as potentially qualifying supervisees.

> one of the five. Now, I have listed all of the people in the Government's Bills of Particular[;] and those whom the Court, in its deliberation on the Rule 29 motion, found did not qualify, I would ask that the Government not be allowed to argue them.

Petitioner's counsel urged that he had had the right to rely on the bill of particulars, that the bill of particulars told counsel those persons whose possible supervisee role he did not have to prepare to dispute, and that as a consequence of the government's bill of particulars he did not attack the allegations against or seek to find and compel the presence of the attorneys Diaz and Smith. The trial court granted this motion and barred government counsel from arguing that Diaz and Smith could be considered by the jury as supervisees. The government was thus limited to arguing to the jury that it had made out its case for five supervisees from 10 of those it had listed in its bill of particulars.

After jury argument, but before the jury charge, petitioner asked for an instruction that would have limited the jury to considering those individuals who had

passed muster on the court's Criminal Rule 29 review and would have prevented the jury from straying into consideration of Diaz and Smith as possibly qualifying supervisees. The instruction tracked the court's earlier ruling, by naming as the universe of potentially qualifying supervisees precisely those individuals whom the court had permitted the government to argue.[8] Without any attempt to rationalize its decision on the proposed instruction with its

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[8]The proposed instruction read:

> In order to satisfy this [the supervision] element of the offense, you must find that the defendant organized, supervised or managed five or more of the following individuals:
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> -- Flo Burk
> -- Charles Brazel
> -- William Burns
> -- Robert Collins
> -- Michael Rouperich
> -- Michael Colvin
> -- Leo Radosta
> -- Judson Durbin
> -- Chico
> -- Rudy Keys

prior rulings on the motions in limine, the trial court refused to deliver the instruction.[9]

Petitioner demanded the jury instruction from the court, not simply because it would guide the jury in line with the notice provided by the bill of particulars and the court's prior rulings limiting argument to the list of 10, but because of what had occurred during closing argument. As previously explained, evidence about the attorneys, Diaz and Smith, and other co-conspirators in the bill of

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[9]Petitioner, both before and after verdict, proposed that the jury, by special interrogatory, list those whom it concluded were organized, supervised or managed by the defendant. If the instruction containing the interrogatory had been given, we would know definitively whether the jury counted attorneys Diaz and Smith, or others not included in the subclass of 10, among the minimum five CCE supervisees it found to convict. The government opposed the instruction, and the court would not deliver it, so that we cannot determine whether failure to give the limiting instruction was in fact harmful or harmless.

particulars was relevant to prove the Count 2 general drug conspiracy. Thus, the in limine ruling of the trial judge, applying as it did only to the Count 1 CCE charge, could not properly have barred the government in summation from arguing altogether about Diaz and Smith, and the other co-conspirators. Subtly but cleverly in the government's argument Diaz and Smith became insinuated from their proper place in the pattern of the Count 2 conspiracy into the forbidden fabric of the Count 1 CCE. On a fair reading of the government's closing argument, the jury was invited to find Diaz and Smith to be qualifying supervisees by allusions that could only lead a juror, not otherwise harnessed against such diversion by an instruction from the court, into an

impermissible decision.[10] The same was true with regard to other co-conspirators named in the bill of particulars but excluded

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[10]For example, the government argued:

> Now, the first element for a continuing criminal enterprise is (sic) there be five or more people that worked in concert with Mr. Linn as part of this drug network.
>
> * * *
>
> [Y]ou have the people that handled money for him, the people that helped get it into the safety deposit boxes and into the vault, the people that helped get it to (sic) Turks & Caicos and sent it all the way back around so that he could buy that nice $325,000 house in San Francisco.

The people who handled money for petitioner, the people who helped him get it into the safety deposit boxes, who placed it into a vault, the people who helped him get the money to Turks & Caicos and then back to the United States were attorneys Diaz and Smith (as well as Rudy Keys).

> You've got the people that helped him set up the operation to set up the house in the name of the corporation, Middle Eastern Ventures with a fictitious name, Falino?

These "people" were Diaz and Smith. The prosecutor continued to emphasize Diaz and

from argument on the motion in limine.

8. This is not a CCE case where the government offered the jury a superabundance

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Smith's role in the alleged CCE:

> What you're going to find, and what the evidence has showed is that there's one fellow who was common to all these groups of people, the launderers, the wholesalers, the sources of supply, the people that were buying property, one fellow, and that's Kenneth Linn, the organizer.

Moreover, even the non-insinuating highlighting of Diaz and Smith's roles could have confused the jury on the CCE count.

> And how were [the post office boxes] set up? Well, Mr. Diaz went down and set up that Middle Eastern Ventures' account for him in the name of Robert Falino and signed as the power of attorney so Mr. Falino wouldn't have to go in there and come up with false identification, which he apparently did not have.
>
> * * *
>
> When that money, that $320,000 comes back into the country, lo and behold, its in the name of Western Properties, and the fellow, Rudy Keys, was joined by Mr. Smith, Robert Dane Smith sent the money out, but when it came back in, look on the documents, Document 18 relating to who the

of obvious supervisees, so that an impermissible few, more or less, could be considered harmless. Petitioner contended that he was a lone wolf, who purchased cocaine from several independent sources, some more regular than others, and sold to

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> attorney was that was representing Western Properties, Mr. Linn had the power of attorney, it was Robert Dane Smith.
>
> * * *
>
> Now, what about the money laundering division?... I've told you about the setting up this permanent operation to conceal what was going on, but the laundering of funds, avoid the IRS... Flo Burk told you that Mr. Linn had told her that Mr. Diaz had a connection with the bank and would make sure that the IRS didn't find out about the money.
>
> * * *
>
> How in the world was Rudy Keys able to conjure up Robert Dane Smith? Please look on the document, 18, and see if Robert Dane Smith, the guy that helps in the front end to get the money out of the country, doesn't show up on the back end helping Mr. Linn on behalf of Western Properties purchase it.

various independent buyers, some more regular than others. He had no partners or lieutenants, had with two exceptions no runners or deliverymen, and exercised no supervision or control over his buyers and what they did with the cocaine they purchased. A jury could well have found petitioner not guilty of the CCE charge.[11]

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[11]Petitioner requested, and the trial court delivered, an instruction describing his theory of defense:

> The Defendant acknowledges that each time he bought cocaine or sold cocaine, he thereby worked in concert with the buyer or seller and therefore is guilty of conspiracy to possess with intent to distribute and the distribution of cocaine. The Defendant also acknowledges that he made substantial income from his drug selling activities. However, the Defendant contends that he was essentially a lone wolf, basically an independent operator, who did not have an organization or enterprise and that therefore the continuing criminal enterprise statute does not apply to him. Defendant contends that he did not organize, supervise or manage five or more persons in an enterprise, even though he made substantial income from his drug

One of the exceptions to petitioner's solo operation was Flo Burke, his girlfriend for much of the period of the conspiracy. Burke, among other things, mailed packages of cocaine and picked up packages of money from the sale of cocaine under petitioner's direction. A second exception was Charles Brazel. Brazel made the arrangements for petitioner to sell cocaine to and receive payment from one buyer, Michael Colvin. As to these two individuals who worked, more or less, for petitioner, petitioner conceded to the jury that they were supervisees within the meaning of the CCE statute.

There were eight other persons on the list of potentially qualifying supervisees.

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activities and even though in buying and selling cocaine he worked in concert with five or more persons.

Three of them, Leo Radosta, Judson Durbin[12] and Chico, were typical arms-length sources of supply. Two, Robert Lee Collins and Michael Rouperich, were typical arms-length buyers from petitioner. The trial court, in denying the post-verdict Criminal Rule 29 motion, observed that these five persons "sought to be included by the government as qualifiers are either arms length seller-suppliers to defendant, no strings attached, or arms length purchasers from him, no strings attached." App. 24a.[13] That left three individuals to fill the crucial

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[12]The evidence revealed that Durbin, on occasion, reversed roles and bought from petitioner -- but again on an arms-length basis.

[13]The quotation occurs in the district court's opinion after the court, evaluating the evidence in the light most favorable to the government's verdict, found five persons who satisfied the "five or more" element of §848. The court followed the statement quoted in text with: "For purposes of this ruling it is not necessary to and the Court does not address these persons." App. 24a.

remaining three slots, William Burns, Michael Colvin and Rudy Keys. As to each of these, the battle was close and hotly contested.

a. The arms-length purchaser Robert Lee Collins bought cocaine from petitioner for a period of time, and on his own sometimes resold some of it to William Burns. Burns, who also bought from others, decided one day to try to buy from petitioner directly, thus circumventing the markup in price when he bought from Collins. Honoring a protocol in the drug trade, petitioner telephoned Collins to tell him that Burns was there.[14] Burns later paid Collins $5,000, what in the business world might be called a finder's fee (of which petitioner received nought), and began buying, completely at arms length, no strings attached, directly from

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[14]Burns testified that the protocol in the drug business was that "you don't generally go around somebody. If you go through somebody, you keep going through that person."

petitioner. The trial court found that, in the light most favorable to the verdict, the payment by Burns to Collins was "on defendant's condition and direction," thus making Burns an object of defendant's "management," within the meaning of that term in §848(c)(2)(A). App. 22a-23a. However, the jury could well have rejected the government's argument that William Burns, for this one time marginal act of upholding protocol, was transmogrified from an arms-length buyer, no strings attached, into a supervisee.

b. Michael Colvin, alone among the arms-length buyers, received cocaine from petitioner without paying first. When Colvin failed to pay the full amount owed, petitioner insisted that Colvin pledge real estate as security, and assign payments on a promissory note for which Colvin was the

payee.[15] Colvin, a lawyer, drafted an inoperable pledge of the real estate, and only one payment on the note got to petitioner. The trial court, in denying the post-verdict motion for judgment of acquittal, found that, in the light most favorable to the verdict, Colvin qualified as a supervisee because of petitioner's attempt to exert control over him. App. 23a. However, the jury could well have rejected the government's argument that Michael Colvin, who effectively avoided paying petitioner his debt and thus the efforts to "control" him, was in fact under petitioner's control; efforts at debt collection like petitioner's, if they had occurred in the legitimate business world, would not, in any court in the land, turn an arms-length buyer

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[15]There was also a vague threat from an attorney who said he represented petitioner's company, Middle Eastern Ventures, that Colvin could end up in the Atchafalaya Basin if he didn't pay up.

on credit into an employee or managee of an arms-length seller.

c. Rudy Keys was a Bahamian money launderer who had a bank (really not much more than a safe) in the Turks & Caicos Islands. He assisted petitioner in taking $320,000 in cash from Miami to the islands without filing the appropriate Customs declaration. Keys was contacted within the conspiracy period but long after the occurrence of the last substantive act alleged in the indictment. He was not involved in petitioner's drug activities and, although he suspected an illegal source for the cash, did not learn that the cash was derived from drug sales. Petitioner conceded that, under existing circuit court jurisprudence, he supervised and otherwise exerted control over Keys within the meaning of §848(c)(2)(A). However, in 1981, money laundering was not a Title 21 offense.

Petitioner argued that Keys' money laundering activity could not count under §848(c)(2) as one of the "series of violations of this subchapter or subchapter II of" Title 21, i.e., narcotics violations, such as to make Keys a qualified supervisee under the "five or more" element of §848(c)(2)(A). The trial court, in denying the post-verdict Rule 29 motion, found, in the light most favorable to the verdict, that there was a sufficient link from petitioner's drug violations to Keys' money laundering to count the money laundering as "a part of [the] continuing series of [drug] violations," thus qualifying Keys as a §848 supervisee. However, although perhaps not as readily as with William Burns and Michael Colvin, the jury could well have rejected Keys as a supervisee in petitioner's drug business on the technical argument proffered by petitioner.

9. In contrast to the evidence of the qualifying status for Robert Burns and Michael Colvin, the attorneys Diaz and Smith performed services for petitioner that were much more closely in line with traditional activities of supervisees. If the jury, or any of the jurors, were inclined to reject any one of those three, Diaz and Smith were likely persons to look to on the admitted evidence. Moreover, there was little to distinguish some of the co-conspirators who were in the subclass about whom the trial court had authorized argument, e.g., buyer Robert Lee Collins and source Leo Radosta, from other co-conspirators named on the bill of particulars, e.g., buyer Nick Popich, Collins' co-conspirator girlfriend Ann Desbon, or Lynn Gelles, the person who actually distributed Radosta's cocaine to petitioner. The government was barely at the

required five if the jury counted Burns, Colvin and Keys. With the evidence this close on the question of who the jury would count in judging if the government made it to five, guidance from the court, and not simply court imposed restraint on government argument, was essential to bridle the natural impulse to range over the admitted evidence of the lay jury.

10. Petitioner argued in the court of appeals that he was entitled to an instruction that would have prevented the jury from ranging beyond the list of 10. It was these 10 (plus Diaz and Smith) whom the court, by granting petitioner's pre-argument motion in limine, had isolated via its Rule 29 ruling as passing the sufficiency of evidence test for supervisees. The instruction would also have prevented the jury from considering Diaz and Smith as supervisees.

Petitioner acknowledged that the trial court was not bound to instruct the jury in the form of his own proposed instruction. Because, however, the evidence concerning Diaz and Smith and others in the bill of particulars was "admissible... for one purpose," i.e., the Count 2 general conspiracy, "but not admissible... for another purpose," i.e., the CCE supervisee issue, he was entitled to some instruction that would "restrict the evidence to its proper scope." Evidence Rule 105.

In the course of his argument, petitioner also observed that the question might profitably be analyzed in terms of variance. The court of appeals seized on the "variance" strand of petitioner's argument, and then framed the issue solely as one of prejudicial variance from a bill of particulars. The court held, without support from any cited authority, that what the

government represents in a court ordered bill of particulars does not "create in the defendant an entitlement of an instruction reflecting the contents of the bill of particulars." App. 13a. The evidence concerning Diaz and Smith was admitted for all purposes, said the court, without a request for a limiting instruction at the time of admittance or a contemporaneous objection that its admittance created a variance -- ignoring the fact that not until the Rule 29 motion did the government ever suggest that Diaz and Smith could be considered as supervisees, and that Evidence Rule 105 permits the request for the limiting instruction to be made in connection with the final jury charge. Ultimately, the court decided that petitioner was not "prejudiced," as that term is understood in variance cases, because the motion in limine barred the government in closing argument from

explicitly naming Diaz and Smith as supervisees, the government did not do so, and neither did petitioner. The court simply ignored the language and the imperative of Evidence Rule 105. It also ignored the problem that, without a limiting instruction, the jury could forage at will among all persons named as co-conspirators in the evidence, and was not constrained to narrow its focus to the 10 in the subclass of approved names.

11. Petitioner had also requested an instruction that would have required the jury to be unanimous on the only seriously contested issue at trial, the identities of the five or more supervisees. The court gave a standard, general unanimity instruction --

> Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree.

However, petitioner's concern had throughout the case been focused on the exact identities of the supervisees. More particularly, he was concerned that, because of the closeness of the for-and-against facts on the short list of candidates for supervisee status, as well as the Diaz and Smith problem, different jurors might choose different supervisees to fill in the complement of five. Petitioner therefore requested a specific instruction directed to that issue.

> As previously stated, before you may find the defendant guilty of conducting a continuing criminal enterprise you must find that he organized, supervised or managed five or more individuals. Before a particular individual can be counted as one of that number, however, all 12 of you must agree that the defendant organized, supervised or managed that particular person.

The trial court refused to deliver this instruction.

12. The court of appeals held that the jury did not have to agree unanimously on the

identities of the five individuals necessary to satisfy the five-person element of the CCE statute. "[T]he statute does not make the identity of the five subordinates important since '[t]he CCE statute is directed against all enterprises of a certain size.'" App. 19a. Petitioner was therefore not entitled to any unanimity instruction on this element of the offense.

REASONS FOR GRANTING THE PETITION

In recent years a continuing criminal enterprise allegation has become the centerpiece of multitudes of federal drug prosecutions. It is 20 years since Congress created the offense in the Comprehensive Drug Abuse Prevention and Control Act of 1970. Only twice in those 20 years has this Court visited the statute. Jeffers v. United States, 432 U.S. 137 (1977); Garrett v. United States, 471 U.S. 773 (1985). Each

time, the Court has confronted double jeopardy questions. Neither time were the essential elements for conviction of a CCE offense squarely at issue.[16] This application for certiorari raises questions concerning the most regularly contested element of the continuing criminal enterprise statute, the element requiring the government to prove that the defendant acted "in concert with five or more other persons with respect to whom" the defendant "occupies a position of organizer, a supervisory position or any other position of management."

1. The elements of the CCE offense are:

   (a) A felony drug violation;

   (b) The felony drug violation is part of a continuing series of federal drug violations, i.e., at least three;

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[16] In Jeffers, the Court discussed the "in concert" element and its essential similarity to the agreement necessary for a conspiracy, the latter offense in that case having been alleged to be a lesser included offense of the CCE charge. 471 U.S. at 148-150.

(c) The defendant acts in concert with five or more persons;

(d) The defendant obtains substantial income or resources from the series of drug violations; and

(e) As to at least five persons with whom the defendant acts in concert, the defendant "occupies a position of organizer, a supervisory position, or any other position of management."

The first four listed elements of the CCE offense are commonly present in run of the mine cases where no reasonable federal prosecutor would think of prosecuting the defendant as a CCE violator. A single sale of cocaine is a felony. Three sales over the course of a month constitute a continuing series. See, Garrett v. United States, supra, 471 U.S. at 804 (Stevens, J. dissenting). If the defendant buys his cocaine from two separate sources and sells it to three different buyers, the five person "in concert" element -- construed to mean

"conspired with" as in the jury instructions in this case, and see Jeffers v. United States, supra, 432 U.S. at 148-150 -- is satisfied. One kilogram of cocaine purchased by a defendant for $20,000 and then resold by him in gram quantities for $100 per gram will satisfy most juries that the defendant has reaped "substantial income or resources" from his series of drug violations. The contest in seriously disputed CCE cases is generally made of more substantial stuff, most commonly the fifth listed element.

2. The supervisee element of the CCE offense is plainly satisfied where the defendant has five or more underlings who work for him in a drug distribution or importation organization; where, as the Chief Justice termed it in Garrett v. United States, supra, 471 U.S. at 781, he is among "the 'top brass' in the drug ring[]." The more difficult cases are those where a

defendant has no, or at least less than five, employees, but has interacted at some point or another, more or less loosely, with others who are otherwise traditional co-conspirators. These are the contested cases.

These cases are contested in the first instance by arguing to the jury that the government has not proved a full complement of five persons as to whom the defendant "occupies a position of organizer, a supervisory position, or any other position of management." The argument is focused upon what particular co-conspirators did and whether that made them supervisees. The contest moves to a second level when the trial court, before and/or after verdict, is asked pursuant to Criminal Rule 29 to enter a judgment of acquittal for failure of the government to prove up a full five, and is again focused on individuals. In the event of conviction, the question will then be

litigated in the court of appeals on the question of the sufficiency of the evidence to support the jury's finding of five supervisees. The appellate courts, unless simply ratifying the analysis of the district court as in our case, App. 16a and 17a, typically examine the relationship to the defendant of each person whose role as supervisee is contested, and will not affirm the conviction unless there was sufficient proof to convince a rational juror beyond a reasonable doubt of five separate qualifying persons. The appellate reports are replete with cases questioning the sufficiency of the government's proof that one or another particular person qualifies for supervisee status, such that the five person element of the CCE offense is satisfied by proof that a

rational juror could find to be convincing beyond a reasonable doubt.[17]

3. The courts of appeal act correctly

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[17]See, e.g., United States v. Roman, 870 F.2d 65 (2nd Cir. 1989), cert. denied, ___ U.S. ___, 109 S.Ct. 3164; United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1966; United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 3221; United States v. Anderson, 859 F.2d 1171 (3rd Cir. 1988); United States v. Possick, 849 F.2d 332 (8th Cir. 1988); United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 325; United States v. Zanin, 831 F.2d 740 (7th Cir. 1987); United States v. Boldin, 818 F.2d 771 (11th Cir. 1987); United States v. Davis, 809 F.2d 1194 (6th Cir. 1987), cert. denied, 483 U.S. 1007; United States v. Jones, 801 F.2d 304 (8th Cir. 1986); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 480 U.S. 919; United States v. Wilkinson, 754 F.2d 1427 (2nd Cir. 1985), cert. denied sub nom, Beasley v. United States, 469 U.S. 1188; United States v. Becton, 751 F.2d 250 (8th Cir. 1984); United States v. Dickey, 736 F.2d 571 (10th Cir. 1984); United States v. Oberski, 734 F.2d 1030 (5th Cir. 1984); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied sub nom, Meinster v. United States, 457 U.S. 1132; United States v. Mannino, 635 F.2d 110 (2nd Cir. 1980); United States v. Michel, 588 F.2d 986 (5th Cir. 1979), cert. denied, 444 U.S. 825; United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907; United States v. Bolts,

in examining, under the test of Jackson v. Virginia, 443 U.S. 307 (1979), the sufficiency of the alleged proof of five separate supervisees. Jackson made explicit the standard of review required under In re Winship, 397 U.S. 358, 364 (1970), which held that a person may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Emphasis supplied.) Said the Court in Jackson, 443 U.S. at 316, there must be "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (Emphasis supplied.)[18]

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558 F.2d 316 (5th Cir. 1977), cert. denied, 439 U.S. 898.

[18]Jackson v. Virginia, of course, was a state case arising under the due process clause of the Fourteenth Amendment. Its standard of review, however, is the same as that in a federal prosecution under the due process clause of the Fifth Amendment.

4. "Five or more" supervisees is one of the essential elements of the CCE offense. The proof must be sufficient to satisfy a rational trier of fact beyond a reasonable doubt that there are five identifiable individuals who qualify for supervisee status. Each person said to qualify as a supervisee must be proved in fact to be a supervisee; the fact of supervisee status is a "fact necessary to constitute the crime," In re Winship, supra; there must be at least five of these "facts." That is why the district courts on their Criminal Rule 29 review, and the appellate courts on their sufficiency review, must examine the candidates individually, and reject them individually as qualifying for a supervisee role if the proof is insufficient to satisfy any rational trier of fact beyond a reasonable doubt as to any particular person.

5. In a case tried to a jury, no less should be or is required of each fact finder, that is to say, the corporate body of independent minds that is the jury. The identities of the five supervisees is what is at the core of the factual battle in the truly contested cases. The identities of the separate individuals are so crucial that, for all intents and purposes, there either is or isn't a CCE offense depending upon whether the government can rope in five individual conspirators to the supervisee corral. Supervisee status is not a mere historical fact; it is one of the historical facts that is essential to prove a conviction. Individual jurors cannot have divergent views, yea or nay, on such essential facts. Under Winship the corporate decision maker must find individual supervisee roles cumulating to five beyond a reasonable doubt. Anything less is a devaluation of the

constitutional coin requiring proof beyond a reasonable doubt before a jury may tender a guilty verdict, and a diminishment of the Sixth Amendment safeguard that demands unanimity.

6. The Fifth Circuit in our case stated, App. 19a, that the identities of the supervisees is unimportant because "'[t]he CCE statute is directed against all enterprises of a certain size.'" Where a defendant runs a drug ring and has more than five employees, there may be a simple appeal to a generalization about size. But we are not now dealing with that kind of case. In this case, the government has no organization or drug ring to pin on petitioner. Instead, the government stretches here and reaches there in its effort before the jury to arrive at the magic number five:

- one of two arms-length buyers, neither of whom is otherwise a

supervisee, should be counted because petitioner on one occasion causes him to pay a finder's fee to the other (Burns);

- an arms-length buyer who is not otherwise a supervisee should become one when petitioner tries but fails to get him to pay his drug debt (Colvin);
- a man who on one occasion, well after the last substantive act in the indictment, takes a large amount of cash out of the country for petitioner, though not knowingly involved with petitioner's drug activities, should become a drug supervisee (Keys).

The evidence is hardly so overwhelming that a reasonable juror could not reject the argument for supervisee status as to any one

of these three. One juror might look to a peripheral co-conspirator, one whom the district court did not approve under Jackson, to fill the spot his reject has created; a second juror might look to another, perhaps Diaz or Smith; a third to a third. Where the evidence is really close, as it was here, careful scrutiny and unanimous agreement by the jury on the contested candidates is the essence of a fair trial. It is not meaningful to use language like "all enterprises of a certain size," and thus avoid what the jury is intended for in the first place -- resolving the crucial contested facts which constitute the elements for conviction.

7. Like the supervisee element of the CCE offense, the second listed element, a continuing series of violations, contains a numerical requirement. The government must prove at least three federal drug violations

to satisfy the continuing series element, just as it must prove five supervisees to satisfy the supervisee element.

a. In United States v. Echeverri, 854 F.2d 638 (3rd Cir. 1988), the defendant sought, but was refused, an instruction requiring that the jury reach unanimous agreement on each drug offense they believed occurred and constituted the continuing series. The Third Circuit reversed: "A defendant is entitled to have the court insist on unanimous agreement as to all essential elements of the crime charged." Id. at 643. Each of the three violations was an element for which unanimous agreement was required.

b. In United States v. Markowski, 772 F.2d 358 (7th Cir. 1985), cert. denied, 475 U.S. 1018, United States v. Tarvers, 833 F.2d 1068 (1st Cir. 1987), United States v. Jackson, 879 F.2d 85 (3rd Cir. 1989), and in

this case,[19] the First, Third, Fifth and Seventh Circuits held that a defendant was not entitled to an instruction that the jury must agree unanimously on the identities of the five essential supervisees required for the supervisee element of the offense. Each of the five essential supervisees was not an element for which unanimous agreement was required.

There is no principled distinction between the numerical requirements for the continuing series and supervisee elements of the CCE offense. Although there is no actual conflict among the circuits specifically on the supervisee-unanimity question, there is at least confusion about the several numerical requirements of the statute and what place they occupy under the Winship principle of proof beyond a reasonable doubt,

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[19]And cf. United States v. Raffone, 693 F.2d 1343 (11th Cir. 1982)(unanimity instruction not requested; not plain error).

and the Sixth Amendment right to a unanimous verdict. The Court should grant certriorari to clear up that confusion.

8. The first of the motions in limine sought to limit the government's supervisee argument to those persons who were named in the bill of particulars and as to whom the court, in denying petitioner's pre-verdict Criminal Rule 29 motion, had found sufficient evidence to take to the jury. Counsel argued:

> It would give the Jury an unwarranted license to find that one of the individuals whom the Court believed did not qualify under the law, to consider that person as one of the five.

The court granted the motion and circumscribed from the bill of particulars a subclass of names from which the government could argue that it had made its case for five supervisees. The trial court could only have granted the motion if it had rejected

the other persons listed in the bill of particulars on the ground that there was insufficient evidence to take these other named individuals to the jury; insufficient evidence because no rational juror could have found beyond a reasonable doubt that these other individuals were supervisees.

In a series of cases reaching this Court under the double jeopardy clause, the Court has variously held that when a defendant, on the basis that the evidence is insufficient to convict: is acquitted on a demurrer at the close of the prosecution's case (the equivalent of a pre-verdict Criminal Rule 29 motion), Smalis v. Pennsylvania, 476 U.S. 140 (1986); is acquitted after a hung jury on a Criminal Rule 29 motion, United States v. Martin Linen Supply Co., 430 U.S. 564 (1976); is granted a new trial by a trial judge, Hudson v. Louisiana, 450 U.S. 40 (1981); or is granted

a new trial on appeal, Burks v. United States, 437 U.S. 1 (1978), Greene v. Massey, 437 U.S. 19 (1978); the double jeopardy clause bars a retrial. Because insufficient evidence is the equivalent of the Jackson test, there has been a ruling, either explicit or de facto, that no trier of fact could find the defendant guilty beyond a reasonable doubt, and thus an acquittal that bars retrial. "[T]he ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense." Martin Linen Supply Co., 430 U.S. at 571. And that is the end of the matter.

The pre-verdict Rule 29 ruling by the trial court here, grounded by legal necessity on its review for sufficiency of the evidence alleged to support the universe of possible candidates for supervisee status, was "a resolution... of some... of the factual

elements of the offense." That should have ended the matter for this jury as to those persons. The government retained no privilege to have the jury consider individuals whom the jury could not find beyond a reasonable doubt to be supervisees.

But how could the jury know that Ann Desbon, a co-conspirator girlfriend of Robert Collins, Nick Popich, a one-time buyer, or Lynn Gelles, an actual distributor of cocaine to petitioner for source Leo Radosta -- all of whose names were legitimately in evidence as co-conspirators, all of whom were the subject of legitimate argument on the Count 2 conspiracy and substantive counts, but none of whom were within the subclass permissibly to be argued -- could not be considered to be supervisees on the CCE count? The law provides but one mechanism, the legal instruction. An instruction was the essential mechanism to prevent the jury from

doing what due process did not permit it to do: consider candidates for supervisee status whom the court had rejected because no rational juror could have found them to be supervisees beyond a reasonable doubt. Evidence Rule 105 mandated a limiting instruction once petitioner requested it. The failure to give a limiting instruction was constitutional error.

9. The second of the motions in limine sought to preclude argument to the jury that attorneys Diaz and Smith were supervisees. The ground for this motion was that Diaz and Smith were not on the government's original or amended bills of particulars, which together purported to name all supervisees. The trial court granted the motion. The court could only have granted the motion if it decided that the jury would not be

permitted to count Diaz and Smith as supervisees.[20]

Diaz and Smith's names and evidence about their activities were legitimately before the jury, and could legitimately be considered by the jury in connection with the general drug conspiracy count. Because their activities in the jury's mind also might have qualified them as supervisees, and because the government though honoring the letter of the court's ruling regarding argument violated it in spirit, there was a substantial risk that the jury, or some of them, might have impermissibly counted Diaz and Smith in reaching the quotient of five.

Evidence Rule 105 was designed to protect against this very kind of evidential confusion:

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[20]Note that in denying petitioner's post-judgment Criminal Rule 29 motion, the trial court, consistent with this decision, did not even mention Diaz and Smith as possibly qualifying supervisees. App. 22a-24a.

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The rule says that the court "shall restrict... and instruct accordingly." The rule is mandatory, and the same Fifth Circuit that denied relief here has so held. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 266 (5th Cir. 1980)(once the court determines that evidence can be admitted for a limited purpose, "it cannot refuse a request for a limiting instruction"). See also, 1 J. Weinstein and M. Berger, Weinstein's Evidence, §105[05].

The idea that the government's argument could substitute for a jury instruction is certainly an odd one for a court to offer and rely upon. See App. 16a. This Court has quite recently said:

> But arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence,... and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.
>
> Boyde v. California, ___ U.S. ___, 46 Cr.L. 2172, 2176 (3/5/90).

The idea becomes more than odd, indeed appears bizarre, when the government's very argument to the jury has eroded, by reference to role rather than name, the court's explicit prohibition against urging Diaz and Smith on the jury as supervisees. Certainly under these circumstances, though probably under all circumstances, the suggestion that a party's argument is a sufficient substitute for a court's instruction is an untenable one.

Moreover, viewing the problem with tunnel vision as one solely of variance, as the court of appeals did, cannot avoid the

imperative of Evidence Rule 105. The problem was what to do at the specific point, just before argument, when the court ruled that the jury would not be allowed to use Diaz and Smith in its supervisee determination. It was at this point that the evidentiary problem crystalized. It was at this point that the solution by way of a limiting instruction became necessary. Any abstract proposition, of whatever merit, that a bill of particulars cannot create a right to a jury instruction is simply beside the point. It is essential that the lower courts understand that Evidence Rule 105 cannot be ignored.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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March 1990

APPENDIX A

The UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth LINN, Defendant-Appellant.

No. 88-3311.

United States Court of Appeals,
Fifth Circuit.

Nov. 27, 1989.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, JOHNSON and HIGGINBOTHAM, Circuit Judges.

JOHNSON, Circuit Judge:

A Louisiana jury found appellant Kenneth Linn guilty of operating a continuing criminal enterprise. Linn timely appealed the conviction to this Court. For the reasons stated herein, we affirm.

I. BACKGROUND

Linn was charged in an eighteen count indictment with various controlled substances violations. The jury convicted Linn on all counts. On this appeal, we are concered with Count One, which charged Linn with operating a continuing criminal enterprise (hereinafter CCE) in violation of 21 U.S.C. §848.[1]

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[1]The Continuing Criminal Enterprise statute, 21 U.S.C. §848(c), provides in pertinent part:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of

Count I reads in relevant part:

> From on or about January 1, 1979, and continuously thereafter until on or about July 1, 1981, in the Eastern District of Louisiana and elsewhere, KENNETH H. LINN, a/k/a Kenneth Falino, a/k/a Robert Falino, a/k/a James Davis, a/k/a David Snow, defendant herein, knowingly and willfully did engage in a continuing criminal enterprise, in that he did violate Title 21, United States Code, Sections 841(a)(1) and 846, which violations were part of a continuing series of violations of said statutes undertaken by the said defendant, involving more than ten (10) kilograms of cocaine hydrochloride and in concert with at least five (5) other persons, with respect to whom the defendant occupied a position of organizer, supervisor and manager, and from which continuing series of violations the defendant obtained substantial income and resources to which the United States of America is entitled to forfeit including all profits obtained by the defendant, KENNETH H. LINN, in such enterprise or the referenced corporations, and property and contractual rights of

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> organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

any kind affording a source of influence over such enterprises.

During the time period charged in the indictment, Linn operated a drug trafficking business, reselling cocaine that he had purchased from larger scale dealers. Linn's operation relied on regular suppliers and regular customers, as well as individuals who aided in the concealment of his activities and in laundering the proceeds. The cocaine was supplied from three independent sources. The primary source was a Cuban identified only as "Chico," who resided in the Miami area. The other two sources were Leo Radosta, who was himself convicted of operating a CCE, and Justin Durbin.

Linn took delivery of the cocaine supply at a house located at 7390 S.W. 104th Street in Miami. If Linn was displeased with the quality of the merchandise or if he did not need the entire supply, Linn would return

the proffered merchandise to the supplier. Linn set his own prices and made the decision as to which of the buyers would be fronted the cocaine and which would be required to pay up front. The distribution of the cocaine was organized from the house at 7390 S.W. 104th Street. Occasionally, the cocaine would be sent to the buyer via airport to airport express mail. The buyers included William Burns, Robert Collins, Mike Rouperich, Michael Colvin, Nick Popich and Justin Durbin.

Linn was assisted in his distribution scheme by Flo Burke and Charles Brazel. Burke was Linns' girlfriend and companion for much of the period of time covered by the indictment. Additionally, she served as his messenger, often picking up packages of money sent by a buyer. Brazel acted as a go-between. Specifically, he arranged for

Linn to ship packages of cocaine to a post office box for buyer Colvin, and made the arrangements for Colvin to pay Linn. If Colvin failed to pay according to the plan, the job of putting pressure on Colvin fell on Brazel's shoulders.

Linn, sometimes through the alias Robert Falino, utilized two corporations in his business, Middle Eastern Ventures and International Marketing & Development. Middle Eastern Ventures owned the home on 104th Street from which the cocaine was distributed. Both corporations held post office boxes where proceeds from sales were sent, and both held safety deposit boxes used to store cash and cocaine.

Linn engaged the services of two attorneys, Frank Diaz and Robert Dane Smith, as well as a money launderer, Rudolph

Keys,[2] to assist in protecting his money. Keys' services were utilized to bring $320,000 in cash out of the United States and into the Turkes & Caicos Islands. The money eventually traveled back to the United States where it was used to purchase a residence in Fairfax County, California. Keys testified that Smith instructed him on how to use the money. Smith's name also appeared alongside Linn's alias, Robert Falino, on safety deposit box documents relating to a box used to store cocaine and proceeds from the sale of cocaine. Attorney Diaz, who had an interest in the Hemisphere National Bank in Miami, agreed to allow Linn to deposit large sums of money into an account at that bank without filing notification forms with the Internal Revenue Service, thus assisting Linn in concealing his assets from the Government.

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[2]Keys, a citizen of the Bahamas, operated a bank on the Caicos Islands in the Caribbean.

Diaz also held a power of attorney that allowed Linn to set up and gain access to a post office box for receipt of cocaine payments.

Linn was indicted on multiple counts of controlled substances violations. Prior to trial, Linn moved for a bill of particulars specifying the individuals he was alleged to have supervised, organized or managed. The Government compiled (sic), and supplied a lengthy list of names.[3] The names of

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[3]The Government's bill of particulars specified the following persons:

Joan Andre
Charles Brazel
Flo Burke
Williams Burns
Robert Lee Collins
Michael Colvin
Justin Derbin (sic)
Ann Desbon
Gail Lawing
Rudy Keys
Vincent Marcello
Ronnie Martin
Averil Missich
Nick Popich
Mike Ruperich (sic)

attorneys Diaz and Smith were not included in the bill of particulars. During trial, the Government introduced evidence concerning the activities of Diaz and Smith. Such evidence was clearly admissible as proof of the conspiracy count. Linn did not object to the admission of the evidence, nor did he request a limiting instruction. At the conclusion of the Government's case-in-chief, Linn moved for a judgment of acquittal on the CCE count on the grounds that the Government had failed to prove that Linn supervised, managed or

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Marsha Smith
Gary Young
Several unidentified persons of Latin persuasion
Hawaiian Michael
Tomato
Cuban Joey
Chico
Unidentified persons receiving shipments of narcotics from Linn through airport to airport mail service
Lynn Gelles
Leo Radosta.

organized five or more people. The court denied the motion.

Prior to closing argument, Linn filed three in limine motions. First, Linn requested that the Government be instructed not to argue that any of the individuals named in the bill of particulars, except for two, were organized, supervised or managed by Linn. The court partially granted this motion by limiting the Government's argument to only ten of the persons identified in the bill of particulars. Second, Linn requested that the court direct the Government not to argue that Diaz and Smith were organized, managed or supervised by Linn. Third, Linn requested that the court direct the Government to mention in its opening summation all of those persons which it contended that Linn organized, managed or supervised. The court granted the second and

third motions. However, the court denied Linn's post argument request for an instruction limiting the jury's consideration as to the CCE offense to the ten identified individuals. The court also denied Linn's request for a special interrogatory requiring the jury to name the persons which they concluded were organized, managed or supervised by Linn.

The jury returned a guilty verdict on all counts. Linn's postjudgment motion for acquittal based on the sufficiency of the evidence to support the CCE claim was denied.

II. DISCUSSION

A. Variance

Linn argues that the district court erred in refusing the requested defense instruction which would have specified those persons who could be considered among the five or more which Linn supervised, managed

or organized. By not prohibiting the jury's consideration of Diaz and Smith as supervisees, Linn asserts, the court created a prejudicial variance from the bill of particulars.

Linn's reliance on United States v. Grissom, 645 F.2d 461 (5th Cir. 1981), for the proposition that the district court's failure to deliver Linn's requested instruction constituted reversible error is not persuasive. Grissom instructs that a trial court's refusal to give a requested instruction constitutes reversible error only if the instruction is substantially correct, was not substantially covered in the actual charge, and concerns an important point in the trial such that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. The purpose of a bill of particulars is to aid

the defendant in the preparation of his defense. It does not create in the defendant an entitlement of an instruction reflecting the contents of the bill of particulars.

Linn's argument that the failure of the district court to give his requested instruction impaired his ability to present an effective defense stems from what Linn perceives as a prejudicial variance between the bill of particulars and the Government's proof and argument at trial.[4] We conclude

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[4]For the purposes of this appeal, because we conclude that the variance, if any, was not prejudicial, we assume without deciding that Linn objected to the perceived variance sufficiently to preserve the issue for appeal. However, in making this assumption, we also point out that Linn failed, during the course of the Government's case-in-chief, to request an instruction limiting the jury's consideration of the evidence of Smith and Diaz's involvement to the conspiracy count, nor did Linn ever specifically object to a prejudicial variance. There is a general proposition that an objection of variance must be made when the evidence is offered, and the reason of the variance pointed out in order to allow the court to consider an amendment to the bill of particulars, as well as to

that any variance was not prejudicial to Linn's preparation of his defense, and that the failure of the district court to give the requested instruction, if indeed error, was harmless error.

In the instant case, the indictment's CCE count tracked the language of the statute. The bill of particulars amplified the indictment and served the purpose of informing Linn of the predicate for his alleged offense. The device of a bill of particulars ensures that a defendant can prepare an adequate defense and "minimize[s] the danger of surprise at trial." United States v. Johnson, 575 F.2d 1347, 1356 (5th Cir. 1978), cert. denied sub nom. Harelson v. United States, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 254 (1979). "[W]here a fatal

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preserve the error for appeal. See, e.g., Columbia Manufacturing Co. v. Hastings, 121 F. 328 (7th Cir. 1902).

variance is argued, appellant must demonstrate that he was taken by surprise by reason of the variance and that such surprise prejudiced the preparation of his defense." United States v. Horton, 526 F.2d 884, 887 (5th Cir.), cert. denied, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976). Although Linn argues to this Court that he was surprised by the alleged variance, we are dubious of such an assertion. The evidence of Smith and Diaz's involvement was admitted for all purposes during the Government's case-in-chief. No mention of a variance or request for a limiting instruction was made by Linn.

It is not necessary, however, for this Court to peer into Linn's psyche on a quest to determine whether the element of surprise does exist because of our conclusion that Linn has not demonstrated prejudice. The

trial judge granted Linn's Motion in Limine preventing the Government from arguing that Diaz and Smith could be included in the five persons Linn supervised, managed or organized. Linn, himself, in closing argument, itemized the persons who could be considered within the five needed for a CCE conviction on a chart. The Government, in fact, referred to that very chart in summation arguing that there were at least five on that chart for the jury to rely upon. The Government even offered five names to the jury for consideration. The five mentioned did not include Diaz or Smith. Finally, there is sufficient evidence on which to base a finding that Linn did, in fact, supervise, manage, or organize those five. See, infra.

B. Sufficiency of the Evidence

Linn also argues that the evidence was insufficient to support a finding that Linn

supervised, managed or organized five persons. Linn raised this argument in his motion for postverdict judgment of acquittal. The district court, in ruling on that motion, itemized five persons for whom there was sufficient evidence to convict Linn of the CCE count.[5] We have reviewed the record on appeal, and agree with the district court's assessment of the evidence and the reasoning set forth in its ruling on Linn's motion for a postverdict judgment of acquittal.

C. Unanimity Instruction

We find no merit to Linn's argument that the district court erred in refusing to instruct the jury that they had to unanimously agree on the identity of each of the five individuals which satisfy the five-person element of the CCE statute. Linn

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[5]These included Burke, Brazel, Burns, Colvin and Keys.

relies on United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988). In Echeverri, the Third Circuit required that the jury be instructed to unanimously agree on which three criminal acts constituted the continuing series of narcotics violations. By analogy, Linn argues that we should require unanimity in regard to the five-person element.

We do not agree. Rather, we adopt the reasoning of the Seventh and First Circuits which have held that the CCE statutes does not require the jury to agree unanimously on the identities of the five individuals. United States v. Markowski, 772 F.2d 358 (7th Cir. 1985), cert denied, 474 U.S. 1018, 106 S.Ct. 1202, 89 L.Ed.2d 316 (1986); United States v. Tarvers, 833 F.2d 1068 (1st Cir. 1987). We agree with the rationale stated in Markowski and largely followed in Tarvers, to

the effect that the statute does not make the identity of the five subordinates important since "[t]he CCE statute is directed against all enterprises of a certain size." 772 F.2d at 364. So long as the jurors unanimously agree that the defendant supervised, organized, or managed any five persons, this element of a CCE violation is satisfied. Consequently, in the instant case, the district court's general instruction on unanimity was sufficient; the court did not err by refusing to give the requested instruction.

III. CONCLUSION

For the reasons stated above, we affirm Linn's conviction on the CCE count.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
versus	NO. 84-0283
KENNETH LINN	SECTION "E" (3)

RULING ON MOTION

The motion of defendant pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure for post-verdict judgment of acquittal as to Count 1 was argued and submitted on a prior date.

Defendant contends that his conviction on Count 1, the continuing criminal enterprise statute, 21 U.S.C. §848, is invalid since the prosecution failed to establish the necessary "five or more other persons" which the Statute requires. In pertinent part the Statute provides that a person is guilty if he conducts illegal activities:

> ".... in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management."

In reviewing whether the evidence is sufficient to convict this Court must determine whether a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict. United States v. Jackson, 807 F.2d 1185 (5th Cir. 1986).

Defendant concedes that two persons, Flo Burke and Charles Brazel, qualify to be included in the requisite five. Defendant strenuously argues that there was insufficient proof that he occupied a position of organizer, supervisor or manager of an additional three persons. These terms, organizer - supervisor - manager, are not technical terms. They are to be interpreted

according to their ordinary meaning. United States v. Oberski, 734 F.2d 1030, 1032 (5th Cir. 1984). The government contends that it has established that more than the requisite five qualify and that defendant's motion is without merit.

Viewed in the light most favorable to the verdict the evidence qualifies William Burns. Defendant operated as a middleman, obtaining quantities of cocaine from various sources and selling quantities to various purchasers. One such purchaser was Robert Collins, who in turn sold to Burns, among others, on occasions. Burns sought to deal directly with defendant and was allowed to do so after, on defendant's condition and direction, paying to Collins a $5,000.00 fee. The ordinary meaning of the word 'manage' includes the exertion of control over someone

in a given situation or making someone submissive to one's authority.

For similar reasons Michael Colvin qualfies as one of the 'five' by having been managed by defendant. Colvin was "fronted" cocaine by defendant, receipt before payment. When Colvin failed or was unable to pay the full amount owed, defendant required that Colvin provide real estate as security and to assign payments on a promissory note.

Rudy Key, the money launderer, is the fifth person who qualifies, viewed in the light most favorable to the verdict. Defendant effectively concedes that Key was organized, supervised or managed in the memorandum in Support of the motion, pp. 3, 4. The argument defendant poses is that Key did not act in concert with defendant with regard to a drug transaction, rather acted with regard to a currency violation. Courts have

held that a facet of cocaine distribution is the laundering of ill gotten proceeds. United States v. Metz, 608 F.2d 147, 153 (5th Cir. 1979). Such laundering activity may be integral to the success of a narcotics conspiracy. United States v. Dela Esprilla, 781 F.2d 1432, 1436 (9th Cir. 1986), and thus to the success of a continuing criminal enterprise as well.

The remaining persons sought to be included by the government as qualifiers are either arms length seller - suppliers to defendant, no strings attached, or arms length purchasers from him, no strings attached. For purposes of this ruling it is not necessary to and the Court does not address these persons.

For the reasons aforesaid the motion of defendant is DENIED.

New Orleans, Louisiana, this 11th day of April, 1988.

/s/ Marcel Livaudais, Jr.
United States District Judge

(2)

No. 89-1517

In the Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH LINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court should have instructed the jury that, in order to convict petitioner of conducting a continuing criminal enterprise, it would have to agree unanimously on the identities of five individuals whom he supervised.

2. Whether the district court should have instructed the jury that, in determining whether petitioner supervised at least five individuals, it could not consider the two attorneys who assisted petitioner's drug-trafficking enterprise, because they were not listed among the alleged subordinates in the bill of particulars.

3. Whether the district court should have given a jury instruction limiting the individuals who could be considered as petitioner's subordinates to those whom the court allowed the government to identify in its closing argument.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 889 F.2d 1369.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1989. The petition for rehearing was denied on December 28, 1989. The petition for a writ of certiorari was filed on March 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was con-

victed on one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848;[1] nine counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; and seven counts of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b). He was sentenced to 25 years' imprisonment. The court of appeals affirmed. Pet. App. 1a-19a.

1. The evidence at trial showed that petitioner operated a cocaine trafficking business. Pet. App. 4a. Petitioner obtained the cocaine from three independent sources. The primary source was identified only as "Chico." The other two sources were Leo Rodesta, who was also convicted of operating a CCE, and Justin Durbin. *Ibid.* Petitioner, sometimes using the alias "Robert Falino," operated his drug business largely through two corporations, Middle Eastern Ventures and International Marketing & Development. Middle Eastern Ventures owned the house where petitioner weighed, tested, cut, and packaged the cocaine for distribution. Both corporations held post office boxes where proceeds from sales were received, as well as safety deposit boxes that were used to store cash and cocaine. *Id.* at 6a.

Petitioner set his own prices and decided which of his buyers would be "fronted" the cocaine and which would be

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[1] Section 848(c) of Title 21, provides in part that:

a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and;

(B) from which such person obtains substantial income or resources.

required to pay in advance. Pet. App. 5a. Occasionally, petitioner arranged to send cocaine to the buyer via express mail. The buyers included William Burns, Robert Collins, Mike Rouperich, Michael Colvin, Nick Popich, and Justin Durbin. *Id.* at 4a-5a.

Petitioner was assisted in his distribution scheme by Flo Burke, his girlfriend, and Charles Brazel. Burke served as petitioner's messenger, often picking up packages of money sent by buyers. Brazel acted as a go-between, arranging for petitioner to ship cocaine to a post office box for buyer Colvin, and making arrangements for Colvin to pay petitioner. Brazel also was responsible for putting pressure on Colvin when Colvin failed to pay according to plan. Pet. App. 5a-6a.

Petitioner engaged the services of two attorneys, Frank Diaz and Robert Dane Smith, as well as a money launderer, Rudolph Keys, to assist in hiding and laundering the proceeds of his drug operation. Keys assisted petitioner in bringing $320,000 in cash out of the United States and into the Turks & Caicos Islands. Eventually, the money was transferred back to the United States and used to buy a residence in California. Attorney Smith's name appeared on documents relating to a safety deposit box used to store cocaine and cocaine proceeds. Attorney Diaz, who had an interest in the Hemisphere National Bank in Miami, agreed to allow petitioner to deposit large sums of money into an account at that bank without filing notification forms with the IRS. Diaz also held a power of attorney that allowed petitioner to gain access to a post office box for receipt of cocaine payments. Pet. App. 6a-8a.

2. Prior to trial, petitioner moved for a bill of particulars specifying the individuals he was alleged to have supervised. The government supplied a list of names, not including attorneys Diaz and Smith. During trial, the government introduced evidence concerning the activities of Diaz and

Smith. Petitioner did not object to the admission of that evidence, nor did he request a limiting instruction. Pet. App. 8a-9a.

Prior to closing argument, petitioner filed three *in limine* motions. First, he requested that the government be instructed not to argue that he supervised any of the individuals listed in the bill of particulars, except for two. Second, petitioner requested that the court direct the government not to argue that petitioner supervised Diaz and Smith. Third, petitioner requested the court to direct the government to name in its summation all those persons whom it contended petitioner had supervised. The court granted the second and third motions, and granted the first motion in part by limiting the government's argument to only 10 of the individuals identified in the bill of particulars. But the district court denied petitioner's request for an instruction limiting the jury to consideration of those 10 individuals as possible subordinates for purposes of the CCE count. Pet. App. 10a-11a.

4. On appeal, petitioner contended, first, that by failing to prohibit the jury from considering Diaz and Smith as petitioner's subordinates, the court caused a prejudicial variance from the bill of particulars. In rejecting that claim, the court explained that a bill of particulars "does not create in the defendant an entitlement [to] an instruction reflecting the contents of the bill of particulars." Pet. App. 13a. Although the court expressed doubt that petitioner was surprised by the alleged variance, it found it unnecessary "to peer into [petitioner's] psyche." *Id.* at 15a. Rather, the court of appeals concluded that any variance from the bill of particulars was harmless because (1) the district court had granted petitioner's motion to prevent the government from arguing in its summation that Diaz and Smith could be included among the five or more persons petitioner supervised; (2) the defense had itself in closing argument itemized the

persons who could be considered as subordinates; (3) the government had offered five names to the jury, not including Diaz or Smith; and (4) the evidence was sufficient to show that petitioner supervised those five. *Id.* at 15a-16a.

The court of appeals also rejected petitioner's contention that the district court should have required the jury to agree unanimously on the identity of each of the five subordinates. The court reasoned that the CCE statute "does not make the identity of the five subordinates important since [it] is directed against all enterprises of a certain size." Pet. App. 19a. The court concluded that, "[s]o long as the jurors unanimously agree that the defendant supervised, organized, or managed any five persons, this element of a CCE violation is satisfied." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 49-52) that the district court should have instructed the jury that, in order to convict him on the CCE count, it must agree unanimously on the identity of each of the five individuals whom he supervised. Every court of appeals that has addressed this issue has declined to require such agreement. See *United States* v. *Jackson*, 879 F.2d 85, 86-90 (3d Cir. 1989); *United States* v. *Tarvers*, 833 F.2d 1068, 1073-1075 (1st Cir. 1987); *United States* v. *Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Cf. *United States* v. *Raffone*, 693 F.2d 1343, 1347-1348 (11th Cir. 1982) (absent a request to do so, district court's refusal to give such an instruction not plain error), cert. denied, 461 U.S. 931 (1983). In *Tarvers*, the First Circuit approved a jury instruction expressly stating that the jurors did not have to agree unanimously on the subordinates' identities. 833 F.2d at 1074.

The courts of appeals correctly recognize that the CCE statute is concerned with the size of the criminal enterprise, not the identities of the subordinates supervised by the defendant. See *Markowski*, 772 F.2d at 364. The purpose of the "five subordinate" element of the CCE offense is to establish that "the organization in which the defendant played a leadership role was sufficiently large to warrant the enhanced punishment provided by the * * * statute." *Jackson*, 879 F.2d at 88. Accordingly, the issue for the jury is not the identity of each of the subordinates, but simply whether the defendant exercised "the requisite degree of supervisory authority over a sizeable enterprise." *Id.* at 88-89. Requiring the jury to agree unanimously on the identities of each of the subordinates would be contrary to the principle that jurors need not agree on the "specific fact[s] underlying an element" of a crime so long as they reach a consensus on the element itself. *Tarvers*, 833 F.2d at 1074. If unanimity were required as to the identities of the subordinates in a CCE prosecution, then "there would be no principled reason not to require [a unanimity] instruction as to virtually every factual element in any conspiracy count, including the identities of the co-conspirators and the overt acts." 879 F.2d at 88.

Petitioner's reliance on *United States* v. *Echeverri*, 854 F.2d 638, 643 (3d Cir. 1988), is unavailing. In *Echeverri*, the Third Circuit held that where, in proving the "continuing series of violations" element of a CCE offense, the government introduced evidence tending to show numerous alleged violations, any three of which could have been the focus of a particular juror, the district court's general unanimity instruction was insufficient. 854 F.2d at 642. Whatever the merits of that decision, it does not support petitioner's argument here. In *United States* v. *Jackson*, *supra*, the Third Circuit expressly held that juror unanimity is not required as to the identities of the five subordinates,

and distinguished *Echeverri*. As the *Jackson* court explained, "[t]he failure to give a specific unanimity charge or [instruction] in * * * *Echeverri* left open the possibility that [the] named defendants could have been convicted without substantial agreement by the jurors as to what criminal acts they performed." 879 F.2d at 89. "In contrast," the court continued, "precise details such as the identities of the underlings are not an essential element of the CCE offense but merely historical facts as to which the jurors could have disagreed without undermining their substantial agreement as to the ultimate and essential fact of whether the requisite size and level of control existed." *Ibid.*

2. Next, petitioner contends (Pet. 56-60) that the district court should have instructed the jury that it could not consider attorneys Diaz and Smith in determining whether petitioner supervised at least five individuals, because the two attorneys were not listed by the government as potential subordinates in its bill of particulars. As an initial matter, petitioner failed to preserve this claim at trial by neglecting to request an instruction specifically disqualifying Diaz and Smith from consideration as potential subordinates.[2] See Pet. App. 13a n.4. In any event, the government's failure to list Diaz and Smith in the bill of particulars did not disqualify them from consideration as potential subordinates. The purposes of a bill of particulars are to minimize surprise at trial and to aid the defendant in preparing his defense. *United States* v. *Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985); *United States* v. *Johnson*, 575 F.2d 1347, 1356 (5th Cir 1978), cert. denied, 440 U.S. 907 (1979). In the

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[2] Petitioner sought an instruction limiting the individuals who could be considered as subordinates to the 10 persons, not including Diaz and Smith, whom the court allowed the government to identify in its summation. But petitioner never suggested that the instruction was needed on the ground that Diaz and Smith were not listed in the bill of particulars. 11 Tr. 128, 170-171.

absence of surprise or prejudice, the courts of appeals have held that "there is no absolute requirement that the government name more than five supervisees, or even that the supervisees be identified at all." *Burt*, 765 F.2d at 1367. See also *United States* v. *Zanzucchi*, 892 F.2d 56, 58 (9th Cir. 1989); *United States* v. *Rosa*, 891 F.2d 1063, 1067 (3d Cir. 1989); *United States* v. *Hawkins*, 661 F.2d 436, 451-452 (5th Cir. 1981), cert. denied, 456 U.S. 991 (1982). Here, petitioner makes no effort to demonstrate surprise or prejudice stemming from the failure to name Diaz and Smith in the bill of particulars. The court of appeals observed that petitioner failed to object to the evidence concerning Diaz and Smith when it was introduced, and expressed doubt that the alleged variance caused petitioner any surprise. Pet. App. 15a. In addition, any error in the district court's failure to instruct the jury that Diaz and Smith could not be considered as potential subordinates was harmless. In closing argument, both defense counsel and the government made use of a chart listing the persons who could be considered as potential subordinates. The names of Diaz and Smith were not listed on the chart. Pet. App. 16a. During its closing argument, the government suggested five supervisees to the jury, not including Diaz or Smith. *Ibid.* And, as the court of appeals held (*id.* at 16a-17a), the evidence supported a determination that petitioner supervised at least five underlings other than the two attorneys. In these circumstances, petitioner was not prejudiced by any possible variance between the bill of particulars and the proof at trial. *Id.* at 15a-16a.

3. Finally, petitioner contends (Pet. 52-56) that the district court should have given an instruction limiting the jury to considering as possible subordinates only those individuals whom the court allowed the government to mention in its closing argument. Petitioner argues that such an instruction was necessary because the district court, in

limiting the number of alleged subordinates the government could identify, held that the evidence was insufficient to show that he supervised anyone else. In fact, the district court did not so hold. In response to petitioner's motion that the government be barred from arguing that petitioner supervised any of the individuals named in the bill of particulars, except for two, the court asked government counsel on whom it intended to rely for the five subordinates. When the government listed ten individuals, the court ordered the government to confine itself in closing argument to identifying only those ten. 11 Tr. 6-10. The district court did not hold that the evidence of supervision was insufficient as to any other possible subordinate. Accordingly, petitioner is incorrect in arguing that the district court's restriction on the government's closing argument necessitated a corresponding instruction to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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